

HUMAN SERVICES BOARD

INTRODUCTION

FINDINGS OF FACT

1. The incident in question occurred on October 28, 2008 and involved the petitioner's son, who is a high school student. The petitioner and his son became involved in a physical altercation after school hours. School officials

intervened, told the petitioner to leave, and took the boy into the school.

2. Two school officials testified that when they intervened the petitioner was sitting on his son on a small patch of lawn next to the school parking lot, had pinned his arms with his legs, and was "aggressively pushing his fist into his son's face". They observed that the petitioner was extremely angry and agitated, and was loudly shouting at his son. The school officials did not witness any punches thrown.

3. After the boy was taken inside, the school officials asked him if he was injured. Although he was upset, he said only that his shoulder hurt. When he removed his shirt the school officials observed and photographed a three inch red "scratch" on his upper arm that did not appear to have broken the skin. They did not observe any other marks, bruising, or other indications of physical injury. The school officials reported the incident to the police and the Department at that time. There is no allegation or indication that the scratch, which appears quite minor in the photographs, lasted more than a day or two.

4. Although the school officials understood that arrangements were being made by the Department to have the

boy spend the night away from his home that night, it appears that he did return home.

5. A Department investigator interviewed the petitioner's son at school the next day. The Department represents that the boy told her that his father had "punched" him in the stomach during the altercation. There is no evidence, however, that the boy had complained of stomach pain or injury the day before, or that anyone followed up on this allegation the next day either by checking for any sign of physical injury or by having the boy examined by a doctor or school nurse. There is no evidence or indication that the Department took any further action in the case other than to eventually "substantiate" it as abuse due to "physical harm".

6. The petitioner's son testified at the hearing. He stated that he had stayed after school for lacrosse practice that day, and that he knew he would be "in trouble" when he got home because he had sworn at his younger sister earlier that day. He said that when his father came to pick him up after practice he preemptively swore at him ("don't fuck with me") and assumed a confrontational physical stance. He said that his father "took me down in a controlled way" and

"tapped" his fist into his stomach to demonstrate that he could not physically intimidate him.

7. Although, by the time of the hearing, the petitioner's son was clearly trying to minimize the incident, he stated that he had been "still mad" at his father the next day, when he may have reported being "punched" in the stomach to the Department. At the hearing, the son described it as a "tap".

8. The son also testified that he had been wearing a jacket when he had tangled with his father, and that the scratch on his upper arm more likely had come from his earlier lacrosse practice.

9. While the son's demeanor at the hearing (best described as cocky) may have undermined the credibility of his testimony describing the seriousness of the incident, it lends substantial support to his testimony that he had blatantly and deliberately provoked and challenged his father that day. His testimony that his father has "never hurt me" was also deemed sincere and credible.

10. There is no allegation or indication in this case that the petitioner has ever engaged in any other inappropriate or physically or emotionally questionable behavior with either his own or any other children, or

adults. The petitioner is a doctor and apparently devotes a considerable amount of time to volunteer activities regarding children's health and education.¹

11. There also is no claim or indication that the petitioner, at this time, is not remorseful about the incident and cognizant that his behavior was inappropriate.

ORDER

The Department's decision to substantiate abuse is reversed.

REASONS

The Department is required to investigate reports of child abuse and neglect and to maintain a registry with the names and records of those who are determined to have a "substantiated" finding that they abused or neglected a child. 33 V.S.A. § 4913 and 4916. A report is considered substantiated when it is "based upon accurate and reliable information that would lead a reasonable person to believe that the child has been abused or neglected." 33 V.S.A. § 4912(10). Any person against whom a report of abuse is

¹ The school superintendant testified that both before and after the incident the petitioner has been involved in such activities at that school.

substantiated by DCF may appeal to the Human Services Board. In such cases the burden of proof is on the Department. 33 V.S.A. § 4916b.

The pertinent sections of 33 V.S.A. § 4912 define abuse, harm, and physical injury as follows:

- (2) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare . . .
- (3) "Harm" to a child's health or welfare can occur when the parent or other person responsible for his welfare:
 - (A) Inflicts, or allows to be inflicted, upon the child, physical or mental injury . . .
- (6) "Physical injury" means death, or permanent or temporary disfigurement or impairment of any bodily organ or function by other than accidental means. . .

The petitioner in this case argues that the Department has not sustained its burden of proof because the above-described "scratch" on his son's upper arm, which, the Department concedes, is the only alleged "injury" in this matter, does not constitute the level of "temporary disfigurement" necessary to show physical abuse. The Department's position in this, and (apparently) all such cases, is that any physical evidence of injury from an

intentional act is sufficient to constitute "temporary disfigurement" under the above statute.

In prior cases in which the Board has addressed this issue it has affirmed the Department in situations where "bruising" has lasted at least for one week or in situations where observed bruising is in conjunction with a history of inappropriate discipline. In Fair Hearing No. 13,796, a daycare worker, pediatrician, and Department investigator had all observed bruises that were apparent more than one week from the incident in question. Although the abuse in that case was an isolated incident during the emotional distress of a divorce, the existence of bruising one week after the incident was deemed sufficient to show that the child had been hit with sufficient severity to uphold an abuse substantiation. See also Fair Hearing No. 10,543 (Day care provider bit child with bruising evident more than one week from incident), Fair Hearing No. 10,419 (evidence of bruise in conjunction with history of excessive spanking), and Fair Hearing No. 11,444 (bruises and welts caused by hitting child with belt and other objects).

However, the Board has reversed the Department in cases in which it has concluded that the evidence of physical injury did *not* rise to the level of harm contemplated in the

statute. In Fair Hearing 10,687 the Board noted that the definition of "harm", while encompassing a wide range of events, does not require a finding of abuse in each and every case involving visible injury. The Board emphasized that the situation, as a whole, needs to be looked at. Although the parents in that case used spanking for discipline for a short period of time, and the child had a bruise from spanking, the parents were caring parents who normally did not use spanking for discipline, would not do so in the future, and the child was not believed to be at risk of harm.

In Fair Hearing No. 21,257, there was no dispute that petitioner in that case had slapped her child twice--one of them hard enough that the child had "seen stars" and had been left with a visible red mark on his face. However, given the evidence of provocation and stress that the petitioner was under at the time, and the lack of evidence that it was anything more than a one-time occurrence, the Board deemed the evidence insufficient to show that petitioner's acts caused physical injury within the meaning of the statute. See also, Fair Hearing No. H-10/08-480 (welt from a flyswatter, in and of itself, insufficient to establish harm).

In this case, although the petitioner's actions were clearly inappropriate and excessive, the only evidence of physical or emotional harm to his son from the incident in question was a slight three-inch scratch on his son's upper arm. Given the totality of the circumstances, and in light of the Board's prior decisions, it cannot be concluded that the petitioner inflicted physical injury on his son within the meaning of the above statute. Therefore, the Department's decision substantiating the report of child abuse in question must be reversed.

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